



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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KEALI'I S. LOPEZ
DIRECTOR

**PRESENTATION OF THE
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION**

TO THE HOUSE COMMITTEE ON JUDICIARY

**TWENTY-SIXTH LEGISLATURE
Regular Session of 2012**

**Friday, February 10, 2012
2:00 p.m.**

WRITTEN TESTIMONY ONLY

TESTIMONY ON HOUSE BILL NO. 2596, RELATING TO OPEN GOVERNMENT.

**TO THE HONORABLE GILBERT S. C. KEITH-AGARAN, CHAIR,
AND MEMBERS OF THE COMMITTEE:**

My name is Celia Suzuki, Licensing Administrator for the Professional and Vocational Licensing Division ("Division"), Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to testify in support of House Bill No. 2596, Relating to Open Government.

The purpose of House Bill No. 2596 is to clarify current law and would create a uniform process under the Uniform Information Practices Act and the Sunshine Law that would allow government agencies and boards, and not just requesters, to judicially challenge certain decisions of the Office of Information Practices ("OIP").

The Division is responsible for implementing the licensing regulations for forty-seven (47) boards, commissions, and programs. There are twenty-five (25) boards and commissions that are administratively attached to the Department. The bill sets a fair standard for the courts to review OIP's decisions under both laws. While it is not the practice of the boards to routinely challenge OIP decisions, the bill would allow the courts to review OIP decisions in extraordinary cases.

Thank you for the opportunity to testify in support of House Bill No. 2596.

NEIL ABERCROMBIE
GOVERNOR



BARBARA A. KRIEG
INTERIM DIRECTOR

DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT
235 S. BERETANIA STREET
HONOLULU, HAWAII 96813-2437

February 8, 2012

**TESTIMONY TO THE
HOUSE COMMITTEE ON JUDICIARY**

For Hearing on Friday, February 10, 2012
2:00 p.m., Conference Room 325

BY

BARBARA A. KRIEG
INTERIM DIRECTOR

House Bill No. 2596
Relating to Open Government

WRITTEN TESTIMONY ONLY

TO CHAIRPERSON GILBERT KEITH-AGARAN AND MEMBERS OF THE
COMMITTEE:

Thank you for the opportunity to provide testimony on H.B. No. 2596.

The purpose of H.B. No. 2596 is to create a process for an agency to obtain judicial review of Office of Information Practices ("OIP") decisions made under either the Sunshine Law or the Uniform Information Practices Act ("UIPA") and to clarify the standard of review.

The Department of Human Resources Development strongly supports this bill.

We believe that this bill properly balances the competing interests of ensuring that OIP's decisions are founded on proper legal bases while also discouraging agencies from simply and routinely appealing decisions that they disagree with. As presently constructed, agencies do not have a clear avenue of redress via the courts.

We respectfully request that this Committee move this bill forward.



HAWAII COMMUNITY
DEVELOPMENT AUTHORITY



KAKAKO
KALAELOA

Neil Abercrombie
Governor

Joseph L. Dwight, IV
Chairperson

Anthony J. H. Ching
Executive Director

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Honolulu, Hawaii
96813

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STATEMENT OF

ANTHONY J. H. CHING, EXECUTIVE DIRECTOR
HAWAII COMMUNITY DEVELOPMENT AUTHORITY

BEFORE THE

HOUSE COMMITTEE ON JUDICIARY

Friday, February 10, 2012

2:00 P.M.

State Capitol, Conference Room 325

in consideration of

H. B. 2596 – RELATING TO OPEN GOVERNMENT.

Purpose: Creates a process for an agency to obtain judicial review of Office of Information Practices decisions made under either Part I of Chapter 92 or Chapter 92F, Hawaii Revised Statutes, and clarifies standard of review.

Position: The Hawaii Community Development Authority supports this proposal as it seeks to give government agencies the right to obtain judicial review of an Office of Information Practices (“OIP”) opinion under a ‘palpably erroneous’ standard by bringing suit against the decision itself, rather than the OIP or member of the public who originally requested the opinion.

Thank you for the opportunity to testify in support of this proposal.

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
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FREDERICK D. PABLO
DIRECTOR OF TAXATION

RANDOLF L. M. BALDEMOR
DEPUTY DIRECTOR

To: The Honorable Gilbert Keith-Agaran, Chair
and Members of the House Committee on Judiciary

Date: Friday, February 10, 2012
Time: 2:00p.m.
Place: Conference Room 325, State Capitol

From: Frederick D. Pablo, Director
Department of Taxation

Re: H. B. 2596, Relating to Open Government

The Department of Taxation (Department) supports the adoption of H.B. 2596.

H.B. 2596 creates a uniform process for judicial review of an Office of Information Practices (OIP) ruling for governmental agencies. Currently, governmental agencies have no opportunity to appeal a ruling from OIP.

The Department agrees with the intent of the bill, as it is consistent with case law, and provides government agencies with an opportunity to have a third party review OIP's rulings. At the same time, sufficient safeguards are in place to insure that agencies will not be able to use the appeal process to frustrate information requests by the public.

Thank you for the opportunity to provide comments.

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: February 10, 2012, 2:00 p.m.
State Capitol, Room 325

Re: Testimony on H.B. No. 2596
Relating to Open Government

Thank you for the opportunity to submit testimony on H.B. No. 2596.

OIP strongly supports this bill, which would create a uniform process under the Uniform Information Practices Act ("UIPA," HRS Chapter 92F) and the Sunshine Law (HRS Chapter 92, Part I) to clarify an agency's right to judicially appeal an OIP decision that either mandates the disclosure of public records under the UIPA, or concludes that an action is prohibited or required by the Sunshine Law.

The UIPA currently allows record-requesting members of the public to challenge an agency's denial of records through OIP's informal resolution process. Whether or not a requester goes through this informal resolution process, the law allows a requester to go to court to seek de novo review of an OIP decision upholding a denial of access to records by a government agency.

In contrast to a requester's right to appeal, Hawaii's UIPA has never contained a provision allowing a government agency to appeal an OIP decision in the requestor's favor that mandates the disclosure of records. Rather, the UIPA expressly directs agencies that it "shall make the record available" when required

by OIP. (HRS 92F-15.5(b).) Moreover, the UIPA's legislative history indicates that the lack of a process for agency appeals was an intentional omission, designed to prevent lawsuits between agencies, which is why OIP has argued that its decisions could not be appealed to the courts by an agency. Nevertheless, Hawaii's courts in County of Kauai v. OIP, 120 Haw. 34, 200 P.3d 403 (2009), allowed an agency to appeal OIP's decision requiring the disclosure of the agency's executive meeting minutes and rejected OIP's arguments against appellate jurisdiction. Instead, the Intermediate Court of Appeals, in a decision that was summarily affirmed by the Supreme Court, reasoned that the agency's appeal could proceed under the Sunshine Law, even though the agency was actually appealing a separate UIPA determination. Although the Sunshine Law allows "any person" to go to court to determine the law's applicability to a board's discussions or decisions, the law does not specifically permit an agency's appeal of an OIP decision nor does it specify who the opposing party should be if such a lawsuit is brought by a board. Nevertheless, the court allowed the County to sue OIP to overturn OIP's decision made under the UIPA by instead challenging OIP's underlying interpretation of the Sunshine Law.

Rather than continuing to litigate whether OIP opinions should ultimately be reviewable by the courts under either law, which could result in "agencies suing agencies" contrary to the UIPA's legislative intent, OIP is seeking legislative clarification of agencies' appeal rights regarding OIP opinions under both the UIPA and the Sunshine Law. OIP proposes the creation of a uniform procedure applicable to both the UIPA and the Sunshine Law, which would strictly define and limit agencies' right to appeal OIP opinions.

Judicial Review Would be Limited to the Record Before OIP

Under OIP's proposal, the judicial appeal would essentially be a review of OIP's opinion and be limited to the record that was before OIP. By limiting the

court's review to the record before OIP, an agency is more likely to make a serious effort to present its facts and arguments to OIP for its consideration in reaching a decision. This will discourage the agency from summarily denying the requester's argument; hoping for a favorable decision from OIP; and, if the decision goes against the agency, going to court where it will, for the first time, present a full explanation of its position with supporting facts and legal authorities. Encouraging agencies to instead put their best case before OIP is consistent with the Legislature's original intent to have OIP resolve disputes and that the agencies would comply. See HRS Sec. 92F-15.5(b) (mandating that agencies "shall make the record available" pursuant to OIP's decision to compel disclosure under the UIPA). Additional concerns over what will be included in the record reviewable by the court will be addressed when OIP adopts administrative rules to implement the new appeals process.

OIP and the Public Are Not Required to be Parties in an Agency's Appeal

The bill provides that neither OIP nor the requester would be required to appear in an agency's appeal, thus eliminating the agency's ability to win simply by default. The judicial review would be of the OIP decision itself, rather than a suit against OIP or the requester personally. Just as a judge is not sued or required to appear in a case challenging his or her decision, neither OIP nor a requester would be named as parties to the appeal. OIP and the requester would be given notice of the suit and would have the right to intervene, but they would not be required to appear in the case or risk losing by default.

"Palpably Erroneous" Standard for Agencies' Appeals Only

OIP's opinions would be admissible on appeal and shall be considered as precedent unless found to be "palpably erroneous." The "palpably erroneous"

standard is a high standard of review that requires great deference to OIP's factual and legal findings and conclusions, and it was previously applied to an OIP decision by the Hawaii Intermediate Court of Appeals in Right to Know Committee v. City Council, 117 Haw. 1, 13, 175 P.3d 111, 123 (2007), a case involving the Sunshine Law. Thus, this bill represents the codification of a current standard rather than a new requirement of deference to OIP's decisions, and would provide a uniform standard of review applicable to agency appeals under both the UIPA and Sunshine Law. The codification of a high standard of review for the agency appeals process, combined with the limitation of review to the record before OIP, is necessary to discourage agencies from routinely challenging or ignoring OIP's opinions and thus undermining OIP's value as an alternative to the courts in resolving UIPA and Sunshine Law disputes, not subject to the contested case requirements of HRS Chapter 91. (HRS § 92F-42(1).)

To avoid confusion as to the effect of the new review process on a record requester's existing right to go to court on a "de novo" basis after an unfavorable OIP opinion (as currently set out in HRS sections 92F-15(b) and 92F-15.5(a)), the bill would further clarify that the lesser "de novo" standard of review only applies in a requester's (not an agency's) UIPA appeal to court to compel disclosure.

Uniform Standards

The bill would align the standards under UIPA Parts II and III regarding a record requester's appeal to court after an OIP decision upholding an agency's denial of access; would provide a uniform appellate process under the UIPA and Sunshine Law, which are both administered by OIP; and would codify the standard currently recognized by Hawaii's courts for admissibility and precedential weight given to OIP opinions in Sunshine Law litigation.

OIP expects to adopt new administrative rules governing its own processes for handling complaints under both the Sunshine Law and the UIPA to clarify, among other things, what constitutes the record before OIP that will be reviewable by a court under the new appeals process created by this bill. To give OIP time to adopt administrative rules, the bill's original effective date was January 1, 2013.

Senate's Amendment to Companion Bill (SB 2858, SD 1)

The Senate's companion bill, SB 2858, SD 1, changed the effective date to make the bill intentionally defective so that it would necessarily go into conference before adoption.

Additionally, at the request of the League of Women Voters, the Senate Committee on Judiciary and Labor amended this bill's companion, S.B. 2858, by adding a 30-day time limit for an agency to file its appeal of an OIP decision. OIP has no objection to this amendment, which is based on time limits for similar appeals in current court rules. Specifically, bill page one, lines 7-14 were amended (as highlighted) to read:

An agency may seek judicial review of a decision rendered by the office of information practices under this chapter or part I of chapter 92, by filing a complaint within 30 days of the date of the decision to initiate a special proceeding in the circuit court of the judicial circuit where the request for access to a record was made, or the act the office determined was prohibited under part I of chapter 92 occurred.

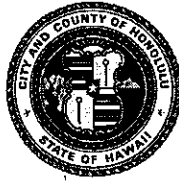
In conclusion, OIP requests this Committee's support of H.B. 2596, which will clarify when, and under what standard, judicial review of OIP's decisions is

available, and will thus eliminate the public's and agencies' confusion regarding this issue and allow administration of the open records and open meeting laws to work more smoothly.

Thank you for considering our proposed legislation.

OFFICE OF THE MAYOR
CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 300 * HONOLULU, HAWAII 96813
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PETER B. CARLISLE
MAYOR

DOUGLAS S. CHIN
MANAGING DIRECTOR

CHRYSTN K. A. EADS
DEPUTY MANAGING DIRECTOR

February 10, 2012

The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary
Twenty-Sixth Legislature
Regular Session of 2012
State of Hawaii

RE: Testimony of Managing Director Douglas S. Chin on H.B. 2596, Relating to Open Government

Chair Keith-Agaran and members of the House Committee on Judiciary, Managing Director Douglas Chin submits the following testimony in opposition to H.B. 2596.

The City and County of Honolulu opposes H.B. 2596 because it unduly restricts the rights of agencies to appeal advisory opinions issued by the Office of Information Practices ("OIP"), without affording any process for agencies to present facts and arguments in support of their position. We believe the bill does not give proper weight to the privacy and public policy interests recognized in statute that limit the application of the Sunshine Law and the Uniform Information Practices Act.

We understand the purpose of the bill is to strictly define and limit an agency's right to appeal an opinion issued by OIP under both HRS Chapter 92 ("Sunshine Law") and HRS Chapter 92F ("Uniform Information Practice Act"). The bill limits an agency's right to appeal in two major areas. First, it limits the agency appealing an OIP opinion to the record before the OIP, and prohibits an agency from submitting additional information and argument in its appeal to the Circuit Court, except in "extraordinary circumstances." This is problematic because it presumes that the agency had a full and fair opportunity and incentive to develop a complete record before the OIP, which is not the case. OIP does not have any rules or procedures for agencies to submit evidence, facts, or arguments in support of their positions. As a result, what the parties submit, and what OIP considers, for purposes of an OIP advisory opinion is too random and unreliable to serve as an exclusive record.

Second, the bill would give OIP's opinion undue weight and deference in agency appeals. It creates a new review standard whereby the Court would have to uphold an OIP opinion unless the agency can demonstrate that it was "palpably erroneous." This is in contrast to the abuse of

discretion standard that is used to review actions of all other agencies as required under HRS §91-14(g). Moreover, agencies would be required to meet this “palpably erroneous” standard based only on the record before the OIP, without the benefit of any procedures for the agency to submit evidence, present argument, and ensure the development of a full record. For these same reasons, the law should not require, as this bill proposes, that courts consider advisory opinions and rulings of OIP as precedent without the procedural safeguards to ensure that they are reliable.

Before an agency can be bound by an OIP opinion, and before an agency’s right to appeal can be restricted, there must be an established procedure whereby agencies are afforded an opportunity to present information and argument in support of their position. Rather than legislate deference to OIP advisory opinions in an appeal to Circuit Court, we believe the proper course would be for OIP to promulgate rules for a fair and equal administrative process whereby both individuals and agencies are allowed to present information and argument to OIP. Alternatively, agencies should be allowed to present information and argument in their appeal to the Circuit Court, similar to the rights afforded individuals, where the OIP advisory opinion would be subject to a de novo review. Without a process to ensure that the legal, public policy, and privacy reasons underlying an agency’s position are heard and considered, the City and County of Honolulu strongly opposes this bill at this time.

Thank you for the opportunity to testify on H.B. 2596.

Bernard P. Carvalho, Jr.
Mayor



Alfred B. Castillo, Jr.
County Attorney

Gary K. Heu
Managing Director

Amy I. Esaki
First Deputy

OFFICE OF THE COUNTY ATTORNEY

County of Kaua'i, State of Hawai'i

4444 Rice Street, Suite 220, Lihue, Hawai'i 96766-1300
TEL (808) 241-4930 FAX (808) 241-6319

Testimony of Alfred B. Castillo, Jr.

Before a Hearing of the House Committee on Judiciary
Friday, February 10, 2012
2:00 pm
Conference Room 325

House Bill 2596 Relating to Open Government

Thank you for the opportunity to submit testimony on H.B. No. 2596, Relating to Open Government.

The County of Kaua'i agrees with the intent of H.B. No. 2596, which is to allow government agencies the opportunity to have decisions of the Office of Information Practices (OIP) judicially reviewed. The County, however, does not support the Bill because of the limitations and restrictions placed in the Bill.

Mahalo,

A handwritten signature in black ink, appearing to read "Alfred B. Castillo, Jr.", with a large, stylized flourish at the end.

Council Chair
Danny A. Mateo

Vice-Chair
Joseph Pontanilla

Council Members
Gladys C. Baisa
Robert Carroll
Elle Cochran
Donald G. Couch, Jr.
G. Riki Hokama
Michael P. Victorino
Mike White

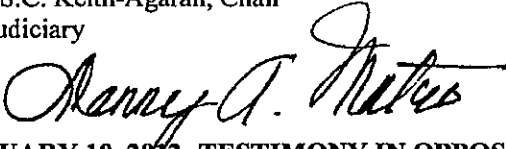


Director of Council Services
Ken Fukuoka

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/council

February 9, 2012

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary

FROM: Danny A. Mateo
Council Chair 

SUBJECT: **HEARING OF FEBRUARY 10, 2012; TESTIMONY IN OPPOSITION TO HB 2596,
RELATING TO OPEN GOVERNMENT**

Thank you for the opportunity to testify in opposition to this important measure. The purpose of this measure is to grant the State Office of Information Practices (OIP) quasi-judicial authority to enforce the Sunshine Law.

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I oppose this measure for the following reasons:

1. The OIP is an Oahu-based agency that has little practical experience with and no incentive to consider the demands placed on county councils. It is unwise to give the OIP the effective authority to penalize the county councils for differing interpretations of the vague Sunshine Law.
2. The OIP is not a court. It is not bound by rules of civil procedure, rules of evidence, due process, or any of the other standards designed to ensure fairness and accuracy in an American tribunal. Therefore, the OIP's opinions should not be given the weight provided by this bill.
3. This bill would have the effect of making the Sunshine Law even more burdensome than it already is. By granting the OIP the power to dictate how the Sunshine Law is interpreted and administered, the county councils will need to incur substantial taxpayer funds to satisfy the demands of the agency.

For the foregoing reasons, I oppose this measure.

Council Chair
Danny A. Mateo

Vice-Chair
Joseph Pontanilla

Council Members
Gladys C. Baisa
Robert Carroll
Elle Cochran
Donald G. Couch, Jr.
G. Riki Hokama
Michael P. Victorino
Mike White



Director of Council Services
Ken Fukuoka

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
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February 9, 2012

TO: Honorable Gilbert S. C. Keith-Agaran, Chair
House Committee on Judiciary

FROM: Joseph Pontanilla, Council Vice- Chair

A handwritten signature in black ink, appearing to read "Pontanilla", is written over the name "Joseph Pontanilla" in the "FROM:" line.

DATE: Friday February 10, 2012

SUBJECT: OPPOSITION TO HB 2596, RELATING TO OPEN GOVERNMENT

Thank you for the opportunity to testify in opposition of this measure. I provide this testimony as an individual member of the Maui County Council.

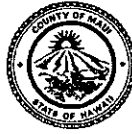
I **oppose HB 2596** for the reasons cited in testimony submitted by Maui County Council Chair Danny A. Mateo and urge you to oppose this measure.

12:02:09:kbm/JP: HB 2596

Council Chair
Danny A. Mateo

Vice-Chair
Joseph Pontanilla

Council Members
Gladys C. Baisa
Robert Carroll
Elle Cochran
Donald G. Couch, Jr.
G. Riki Hokama
Michael P. Victorino
Mike White



Director of Council Services
Ken Fukuoka

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/council

February 9, 2012

TO: Honorable Gilbert Keith-Agaran , Chair
House Committee on Judiciary

FROM: Robert Carroll
Council Member, East Maui

A handwritten signature in black ink that reads "Robert Carroll".

DATE: Friday, February 10, 2012

Time: 2:00p

Place: Conference Room 325, State Capitol 415 South Beretania Street

SUBJECT: **HB 2596 , RELATING TO OPEN GOVERNMENT**

I OPPOSE HB 2596 for the reasons cited in testimony submitted by the Maui County Council Chair, Danny Mateo and urge you to oppose this measure.

Council Chair
Danny A. Mateo

Vice-Chair
Joseph Pontanilla

Council Members
Gladys C. Baisa
Robert Carroll
Elle Cochran
Donald G. Couch, Jr.
G. Riki Hokama
Michael P. Victorino
Mike White



Director of Council Services
Ken Fukuoka

COUNTY COUNCIL
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February 9, 2012

The Honorable Gilbert S.C. Keith-Agaran, Chair
House Committee on Judiciary
Hawaii State Capitol, Conference Room 325
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran:

**Re: Testimony in Opposition to House Bill 2596 relating to Open Government
(Public Hearing on February 10, 2012 at 2:00 pm)**

As the Lana'i member on the Maui County Council, I would like to offer testimony in opposition to HB 2596. This measure creates a process for an agency to obtain judicial review of Office of Information Practices decisions made under either part I of chapter 92 or chapter 92F, Hawaii Revised Statutes, and clarifies standards of review.

The proposed measure would place the burden and cost of appeals on the requesting agency and would not require OIP to participate in the court proceeding as a party and therefore be accountable to defend its actions. Also, OIP opinions should not be considered as "precedent" and given such weight in judicial review. In my view, the proposed measure is seriously flawed.

Thank you for the opportunity to offer this testimony in opposition.

Sincerely,

A handwritten signature in black ink, appearing to read "Riki Hokama", is written over a horizontal line.

Riki Hokama, Councilmember- Lana'i

cc: Council Chair Danny Mateo